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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 269

SOCIEDAD VILLANUEVA DE DESENVOLVIMENTO E EXPLORAÇÃO DE MINAS,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS,

Petitioner,

against

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS, a Portuguese corporation, petitions for a writ of certiorari to review a judgment of the United States Court of Claims filed January 20, 1960.

Opinion Below

The opinion and judgment of the Court of Claims are reported in 180 Fed. Supp. 342 and a copy thereof is annexed hereto as Appendix A.

Jurisdiction

The judgment of the Court of Claims was dated and entered on January 20, 1960. The order of the Court

denying petitioner's motion for rehearing filed February 19, 1960 was dated and entered April 6, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255.

Questions Presented

1. Whether the Court of Claims, in assessing damages for the Government's breach of a contract for sale and delivery to it of tungsten concentrates by a Portuguese corporation may limit such damages to the plaintiff's loss of prospective profits and disregard the holding of this Court in *Burton Coal Co.* v. *United States*, 273 U. S. 337 (1927) that the amount of such profits is immaterial and that the applicable measure of damages for breach by the buyer of an executory contract of sale is deemed as a matter of law to be the difference between the contract price and the market value at the times when and the places where deliveries should have been made.

2. Whether the Court of Claims may refuse to give a plaintiff which, in reasonable reliance on the market value rule of damages established in the *Burton Coal* cases, did not attempt at the trial before the Commissioner to introduce evidence of the probable costs of performing the contract, an opportunity by remanding the case to the Trial Commissioner to present such evidence in conformity with the Court's conclusion of law, contrary to *Burton Coal* that such costs are material to the measurement of damages.

Statutes Involved

No constitutional provision, statute or regulation is involved in the questions presented by this petition.

Statement of Case and Disposition Below

Petitioner was organized in Portugal on August 21, 1951 with the purpose of marketing Portuguese tungsten and other minerals through long-term sales contracts at fixed prices. (Swan: 51(b)(c).) Its long-range objective, which had the support of the Portuguese Government, was the improvement of Portugal's national economy by the modernization and expansion of mining production and the eventual integration of substantial mining operations under its control. (31(a), (b)).

The mining of tungsten in Portugal was for the most part disorganized and primitive. The two largest mines, owned by British and French interests, supplied the bulk of the output. Few other mines were extensively mechanized. A hundred or more small producers operated their mines chiefly by hand labor. (24(c); 27(b), (d)). The location of many ore deposits at or near the surface made hand operations feasible. (24(b)(c)). These deposits were exploited by migrant workers, known as "pilhas," who collected ore from scattered concessions and sold it to local "pickers." The pickers, in turn, disposed of the ore to five or six big "dealers" in the cities. (29(a), (b), (c)).

Despite these desultory and primitive methods of mining and marketing, the industry had demonstrated its enormous potential in World War II, when tungsten was a critical material in short supply because of the unavailability to the Western powers of Asia's great sources of production. By the end of the war the Portuguese General Mining Department had certified some 800 concessions as having proven industrial value. (27(a)). National production reached a peak of 7,500 to 10,000 metric tons per year, largely contributed by pilhas, thousands of whom

were organized into stable work groups (290(c), fn. 70; 60(c)).

The post war decline in demand brought an end to the boom. At least 600 of the 800 registered concessions had closed by 1950. Production had dropped to 2500 metric tons (27(c), (d)). The pitbas were left without steady employment and the small producers without incentive to resume operations. The high spot prices induced by the Korean crisis did little to stimulate production because of the lack of confidence in their continuance, but the potential for expansion remained (28(b), (c)).

It was the basic concept of petitioner to exploit this potential in a manner which would contribute to the national economy, as well as provide profit for itself (31(a)). Incentive to the small producers to expand their production would be given by means of an assurance to them that they would be able to dispose of their increased output over a sufficient period of time to warrant operation and expansion. It appeared that such assurances of demand must take the form of a long term sales contract or contracts with payment secured by a letter of credit (31(b), fn. 7; 64(b)). Petitioner made arrangements for the purchase of mining equipment on long term credit and for the financing of production operations, against a purchaser's letter of credit, by Ultramarino Bank, which was controlled by the Government of Portugal (108(a), (b); 109(a); 152(c), fn. 58). Petitioner held options to purchase many of the mines on which it relied for expanded production (52(b)).

Petitioner's program had the approval of the Portuguese Government (146(b), (c), fn. 32). Responsible officials of that government, including the Director of its Bureau of Mines, cooperated with petitioner in the preparation

its program (66; 70(b) fn. 41; 81(c)). Executives of the company included, in addition to other prominent Portuguese citizens, the Chief of Staff of the Portuguese Army, who was Portugal's delegate to the North Atlantic Treaty Organization, and Portugal's Commissioner General of Unemployment (51(b); 146(b); fn. 41).

Upon ascertaining the need of the United States to acquire substantial quantities of tungsten for its stockpiling program, petitioner commenced negotiations looking toward a long-term sales contract. These negotiations were conducted initially with officials of the Emergency Procurement Service (EPS), a branch of the General Services Administrator (GSA), and subsequently with officials of the Defense Materials Procurement Agency (DMPA), which entered into a contract with petitioner on September 11, 1952 (51(a), (b); 54(a); 104). The provisions of this contract as contained in the findings of the Court of Claims (3(a), (b)) are printed in Appendix B to this petition.

contract required petitioner to sell and deliver to the Government a minimum of 2,970 short tons of tungsten concentrates over a period of 34 months. It required the Government to purchase from petitioner a maximum of 4,290 short tons over the same period (Article I). The contract price for maximum delivery, computed on the basis of ore having 70 per cent trioxide concentration, was $15,962,100 (156, Table 1B).

Each of the parties understood and recognized the principal purposes of the other party in entering into the contract. Petitioner knew that one of the purposes of DMPA was the expansion of tungsten production in Portugal (140(a)). This coincided with one of its own purposes as expressed to the EPS and DMPA representa-

tives" 1400(b)(1). Petitioner also knew that the Government, in addition to promoting the expansion of future sources of supply, desired to procure substantial quantities of tungsten for its stockpile program, which had been severely criticized by the Preparedness Subcommittee of the Senate Committee on Armed Services for inadequate stockpiling of tungsten (23(a), (b), (c); 74(c), (d)). The contract, unlike a development contract, committed petitioner, as the seller, only to supply specified minimum quantities within specified time periods. Petitioner's ability to obtain and deliver these quantities on time was the subject of a special on-the-spot investigation by the Government's engineer of a number of petitioner's anticipated sources of supply (80(c); 81(a); 84).

On its side, the Government recognized that petitioner did not itself own or operate tungsten mines but would act as a middleman, acquiring tungsten by purchase from producers, pilhas and other sources and reselling to the Government. It was explicitly recognized that Atlantic expected to purchase from pickers and dealers to the extent necessary to dry up the black market and would purchase from any other source if essential to fulfill its contractual commitments (67(b), fn. 37; 70(b), fn. 42; 72(a); 76(b); 84; 97(a) fn. 69; 141(a), (b), (c)).

The purposes of the parties were stated in a general way in the preamble to the contract but were not incorporated into any of the contractual obligations. The contract neither expressly nor by implication requires petitioner to develop any mine, to undertake or accomplish the expansion of production, or to purchase from any designated source. It is completely silent on all these matters.

The contract contains no provision or formula for ascertaining the damages payable in event of breach.

On October 27, 1952, six weeks after the contract was signed, before commencement of deliveries and without prior notice to petitioner, DMEA cancelled (4: 123). The stated ground was a determination that petitioner had entered "the open market" for the purchase of tungsten ores in violation of Article XX(d) of the contract, permitting cancellation in the event

> "of the determination by the Government that the Contractor obtained this Contract for the purpose of speculation."

After unsuccessful efforts to obtain reinstatement, petitioner brought this action for breach of contract (128(a), (b)).

The Trial Commissioner and the Court of Claims both found that the stated ground for cancellation was non-existent and that the Government had no other justification for its cancellation (147(a), fn. 45; Appendix A, *infra*, pages 21, 25). On the basis that petitioner could have delivered 3,630 short tons of tungsten ore (consisting of the minimum tonnage plus one half the optional tonnage), the court awarded damages in the sum of $508,200. This represented petitioner's lost profits as best the court could determine from the record before it (167(a), (b), 168; Appendix A, *infra*, page 26). It is based upon findings as to petitioner's *maximum* costs (167(b)). In particular, the findings as to cost of ore acquisition are based only upon evidence of prices to which some of petitioner's contemplated sources of supply were committed and acknowledge that substantial quantities of ore might have been acquired at lower prices (162(a), (b)).

As recognized by the court, the record is fragmentary as to petitioner's costs and profit because petitioner from

the outset of the action deemed these to be immaterial under the *Burton Coal* case and did not attempt to introduce evidence thereof. As the court stated in its findings, petitioner rested its case on *Burton Coal* so far as damages are concerned (157, fn. 67). Accordingly, petitioner did introduce evidence of the market value of tungsten ore at the place and times of delivery, and the commissioner and the court saw fit to make appropriate findings based on this evidence (158(a), (b)). Furthermore, they found that the difference between the contract price and the market value of the 2,650 short tons which petitioner would have delivered is $6,166,455.25 (160). This is the amount to which petitioner contends it is entitled as a matter of law under its contract.

In view of the incomplete state of the record as to its costs, petitioner moved the court to remand the case to the commissioner for the purpose of giving petitioner an opportunity to present evidence on its loss of profits and having the commissioner report his findings and conclusions on damages as established by the record as so supplemented. The court denied this motion without opinion by its order April 6, 1960.

The jurisdiction of the Court of Claims is based upon 28 U.S.C. Section 1491.

Reasons for Granting the Writ

1. Petitioner urges the Court to grant this writ for the reason that the decision of the Court of Claims is in conflict with the controlling decision of this Court, *United States* v. *Burton Coal Co.*, 273 U. S. 337 (1927), which established that the market value rule of damages governs claims against the United States founded on its breach of a purchase and sale agreement. The effect of the decision

below is to deprive citizens of a friendly foreign nation of the equal protection of law on which they had a right to rely in contracting with our Government because it was declared by this Court.

Like the contract here, the contract in *Burton Coal* by its terms was a purchase and sale contract. This Court so held and further held that the usual measure of damages, the difference between the contract price and market value, applied because that measure is deemed to constitute the damages which flow from the breach of a purchase and sale contract. These holdings in *Burton Coal* conform to our well founded and traditionally accepted doctrines governing transactions of sale which occur by the thousands every day and in which buyers and sellers rely on the market value rule to apply by operation of law unless they desire to contract for some other measure of damages.

In *Burton Coal* the Government had refused to accept further deliveries under its contract for the purchase of coal to be supplied by Burton Coal Co., as seller, from specifically named mines of producing companies with which it had subcontracts. The contract provided that Burton Coal Co. could furnish coal from other mines if, for any cause for which it was not responsible, it should be unable to furnish coal in sufficient quantities from the mines specified, but no such contingency occurred prior to the breach. At the time of the Government's breach the market price of coal was below the price which Burton Coal Co. had to pay the mines under its subcontracts. The Government argued that the judgment of the Court of Claims, awarding damages measured by the difference between the contract price and the market price, was erroneous because it put the company in a substantially better position than if the contract had been performed.

The damages awarded under the market value rule were tenfold greater than the difference between the Government's purchase price and the price to be paid by the company under its subcontracts.

This Court determined that there was no reason to depart from the normal rule of damages applied to purchase and sale contracts. In response to the Government's argument and its citations of construction-contract cases awarding the difference between the contract price and cost, this Court noted that the Barton contract was not for production or mining, but for the sale and delivery of coal. The selling company was bound to deliver the coal at all events and would not be excused by failure of the sources specified in the contract. Thus "in contemplation of law" it could have obtained the coal at the market prices prevailing at the times set for delivery. The cost to the company of securing the coal and the amount of its profits were expressly held to be immaterial. The Government could not complain of a judgment that left it in as good a position as if it had performed.

The holding of the court below that petitioner's damages must be measured by its prospective profits rather than by the market value rule cannot be reconciled with *Barton Coal*. The tungsten contract here, like the coal contract there, is one for sale and delivery before, not for production or mining. Petitioner was just as much bound to deliver the quantities of ore required by its contract as was Barton Coal Co. Petitioner's right under its contract to acquire ore at the market prices prevailing at the times of delivery was not even conditionally restricted, as in the coal contract, by any acceptance of an obligation to furnish ore from named sources. A comparison of the two contracts demonstrates that the argument for apply

ing the market value rule is stronger here than in *Burton Coal*. But it should be remembered that this Court did not make the application of the rule dependent upon any finding that the coal company would have purchased at market prices. On the contrary, it is clear that Burton Coal Co. was bound to deliver from the mines with which it had subcontracts. The whole point of the case and the rule is to render immaterial all elements of the performance that were prevented by the breach. Among these elements would necessarily be those relating to cost and profit.

Although the *Burton Coal* case was discussed at length in the commissioner's opinion and in petitioner's brief and argument, the court below summarily disposed of petitioner's contentions in five sentences that do not once refer to *Burton Coal*:

> "We think the plaintiff did not have the right, under the contract, to deliver tungsten bought by it in the open market, except possibly to a minor extent. It was one of the Government's prime purposes, in making the contract to make possible the opening up and development of new sources of tungsten. The contract would not have been made except for the existence of that purpose, and both parties so understood.
>
> "The obtaining of tungsten from the mines from which the parties understood that it was to be obtained, would have been more costly than buying it in the open market, after the market price went down. But, as we have said, the plaintiff was obligated to deliver tungsten from those mines." (Appendix A, pages 25, 26.)

[illegible] ... [illegible] ... [illegible] ... [

These reasons do not take this case out of the rule in *Barton Coal*. They are founded on the purposes which induced the parties to contract rather than on the contract obligations to which they committed themselves.

The purposes of the parties in making the contract have no relevance. In *Barton Coal* it was a mutual purpose that the coal be produced at one or more of three mines in Southern Illinois, but this did not bar the market value rule even though the purpose was written into the contract as an obligation of the seller which could be avoided only if production failed for reasons not under its control.

The court below clearly confuses purpose with obligation. This is analogous to confusing fraud founded on false inducement to make a contract with simple breach of contract. The former does not involve the contract obligations, and the latter does not involve the representations of purpose constituting the inducement. The contract may be read and reread without discovering the ghost of an obligation on petitioner's part to obtain tungsten "from the mines from which the parties understood that it was to be obtained."

That it was the intention of the parties to enter into a simple purchase and sale agreement, having no restrictions concerning the source of deliveries, is not only made clear by the absence of any such restrictions in the contract but in a positive way, is confirmed by Article XX(d) of the contract, permitting cancellation in the event of a determination that the contract was *obtained* for the purpose of speculation. It is certain that this clause relates only to purpose and is confined to the state of mind of petitioner when it entered into the contract. Had it been the intention of the parties, as concluded by the court below, to eliminate any mines or the market as a source for pet-

tioner's deliveries, this provision would have been written in terms of a prohibition relating to performance. The record is clear, however, that the intent of the speculation clause was to provide the Government "with a remedy against a producer who entered into a contract ostensibly to increase production but who lacked honest intention of doing so" (139(c)). By including the qualification against speculation in a clause relating to purpose only, the parties manifested their intent to exclude any like qualification of performance. Consistently with the flexibility required by petitioner in developing many new mines with unproved rates of production, the Government exacted no promise from petitioner as to how it would perform. It was required only to deliver.

Article XX(d), in essence, is nothing more than a representation by petitioner that it had the honest intention, which the court found it never lacked, to try to increase the production of the suppliers from whom it expected to purchase. But such representation of intent did not constitute a promise, and its carrying out was significantly not made a condition or obligation of the contract.

Even assuming that petitioner were obligated to deliver Ingston "from the mines from which the parties understood that it was to be obtained," which obviously can refer only to such mines as petitioner might select in its discretion for development, this does not distinguish *Barton Coal*, where the seller was obligated to deliver coal from three named mines with which it had firm subcontracts at fixed prices above market prices.

The Court of Claims has had occasion in a number of cases to apply the rule in *Barton Coal*. In *Stebel v. United States*, 108 Ct. Cl. 35, 46, 69 F. Supp. 221, 223 (1937),

holding that buyers of parts were not limited to profits they would have made on resale, it stated:

> "This market value rule is so well established that we see no justification for departing from it in this case."

Petitioner is not aware of any case in which the Court of Claims has explicitly sought to repudiate *Barton Coal* or whittle it down. In any event, it is important to grant review here so that *Barton Coal* will not be discarded by a lower court *sub silentio*.

Barton Coal not only sets forth a just and workable rule of damages, but it provides a certain and established rule on which foreign nationals as well as citizens of this country should be entitled to rely in entering into contracts with the United States. Adjudication of the Government's breach brings little satisfaction to an injured claimant deprived under existing law of his full measure of damages. Review of this decision is essential to prevent future dependence on a supposed rule of law which in actuality may no longer be available.

2. If the Court should decide not to review the question presented as to the correct rule of damages, petitioner requests it to consider whether, in view of petitioner's justified reliance on the *Barton Coal* case, the Court of Claims did not abuse its discretion in refusing to remand the case to the commissioner to take additional evidence on damages. The inadequacy of the present judgment of $508,200 is implicit in the fact that it affords a profit of less than 4 percent of the contract price of $13,359,500. The findings themselves recognize that the assumed costs of performance were maximum costs, that substantial

quantities of ore might have been acquired at prices below the figure taken as cost of acquisition, and that the anticipated remission of Portuguese export taxes for use in financing the mechanization of mines gave rise to a high profit potential (Pet. App. 7a). Justice demands that petitioner be afforded an opportunity to establish the full amount of its damages on the basis which the court has adopted, but which petitioner could not reasonably be expected to foresee.

Remand in this case would follow the procedure adopted in *Philadelphia Park Amusement Co. v. United States*, 126 Ct. Cls. 166, 175-174 (1954), where this Court deemed it equitable to suspend judgment and remand to the commissioner for the taking of evidence and filing of a report on the question of the fair market value of an extended franchise held by the plaintiff. This value was necessary to establish the amount of plaintiff's recovery, but could not be determined by the Court from the facts before it "since the case was prosecuted on a different theory." The instant case differs from the foregoing situation only because here the record contains *some* facts on the basis of which the Court has been able to arrive at an award. But since those facts are necessarily incomplete because they were received in evidence on issues other than damages, and are so recognized by the Court, the considerations that actuated the Court in *Philadelphia Park Amusement Co.* indicate that the remand requested herein is likewise fair and equitable.

CONCLUSION

For the reasons given it is urged that the Court should grant this petition.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF CLAIMS

No. 22-53

(Decided January 20, 1960)

COMPANHIA ATLÂNTICA DE DESENVOLVIMENTO E EXPLORAÇÃO DE MINAS v. THE UNITED STATES

Mr. Francis A. Brick, Jr., for the plaintiff. *Mr. Mahlon F. Perkins, Jr.*, was on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, a Portuguese corporation, sues the United States for breach of contract. Under the reciprocity provisions of 28 U.S.C. 2502 it has access to this court. The contract in suit was made on September 11, 1952. On October 27 of that year the United States purported to cancel the contract. The plaintiff says that the purported cancellation was nothing more than a repudiation, and therefore a breach of a valid contract.

The contract in question was for the sale of tungsten by the plaintiff to the United States, the tungsten to be delivered over a period of 34 months. The Government says that it had the right to cancel the contract, by reason of a reservation in the contract of the right to do so upon the occurrence of a certain contingency, which contingency, it

says, occurred, and also by reason of a breach by the plaintiff of a warranty, contained in the contract, against contingent fees. It also says that the plaintiff would not have been able to perform the contract, if it had not been canceled, and therefore was not damaged by not being permitted to attempt to perform it.

We have made voluminous findings of fact, which coincide with the findings made by the commissioner of this court. There were numerous witnesses, and the veracity or the proper interpretation of the testimony of some of them is questioned. The conclusion of the commissioner who heard the testimony and observed the witnesses is entitled to great weight. We shall, in this opinion, narrate the events only to the extent we deem necessary to make our discussion intelligible.

The United States desired to obtain tungsten for American industry and for stockpiling. There were many tungsten mines in Portugal, poorly equipped mechanically. A good deal of tungsten was mined by individuals, with picks and shovels, who then marketed their product through dealers. In spite of its inefficiency, the industry prospered during World War II, but when the demand slackened after the war, there was little production by the smaller mining companies, even though prices were still high in comparison to what they had been before the war.

A Portuguese enterpriser, Dr. Soares, began in 1950 to work on a plan, later developed by the plaintiff corporation, which envisaged the organization of production and marketing in such a way that there could be profitable operation of mines which otherwise would not operate. To do this it would be necessary to bring together a number

of the small mining enterprisers under one management, and to obtain long-term contracts for the sale of the tungsten which the combined operation would produce.

An American, Mr. Pulvermann, who had had extensive experience in mine management in Germany before the war, was in Portugal in 1951 to examine a manganese mine. It did not interest him, but he looked into the possibilities of mining tungsten and came to the same conclusion which Dr. Soares had previously reached. He learned of Dr. Soares' interest and discussed the problem with him for several days. Dr. Soares gave him a 60-day option for the placement in the United States or in Europe of a contract for the sale of specified tonnages of tungsten and tin.

Mr. Pulvermann went to Washington and began to explore the possibilities of selling tungsten to the Government. He discussed the subject with Colonel Westbrook, with whom he had been associated in prior activities. Pulvermann and Westbrook, after investigation, decided that there was a possibility of getting a contract from the Government for the purchase of tungsten from the plaintiff. They considered the legal arrangement which Dr. Soares' company should make for the acquisition of the tungsten which it proposed to sell, and the arrangement which they, Pulvermann and Westbrook, should make for their compensation if the venture should succeed.

Pulvermann returned to Portugal. At his suggestion Dr. Soares persuaded several high Portuguese officials to become officers of his company.

Pulvermann and Westbrook began negotiations with United States Government officials for a contract to purchase tungsten from the plaintiff. The negotiations went on from July 1951 to September 11, 1952, when the contract here in suit was signed. Formidable opposition

to the contract was offered by American representatives in France, Portugal and England. The character of Dr. Soares and his associates was questioned and investigated. The price tentatively agreed on was greatly reduced at a relatively late period in the negotiations. In April of 1952 the Government sent Mr. Lynton, an engineer selected for his competence in that field, to examine the mines from which the plaintiff expected to obtain its tungsten. Lynton made a long report, in which he concluded that the plaintiff company could obtain the tungsten to fulfill its proposed contract. He recommended that the contract be entered into. As we have said, the contract in question was finally signed on September 11, 1952.

On October 24, an American official in London, General Wilson, telephoned Mr. Larson, the official who had signed the contract on behalf of the Government and advised him that there were "very strong protests" from the American Embassy in Lisbon about the contract, and that the Embassy had informed him of definite attempts on the part of the plaintiff to purchase tungsten from sources other than sources from which the plaintiff, under its contract, was permitted to obtain tungsten. Larson asked Wilson to forward to him any "concrete evidence" which he had relating to the latter point. Wilson on the same day sent to Larson a message stating that another company, Pennsalt, had cabled that the plaintiff was offering to buy 100 tons of tungsten from it, Pennsalt, for resale to the United States. Wilson's message reached Larson on the next working day, October 27. Larson regarded the Pennsalt cable as "concrete evidence" of violation of its contract by the plaintiff, and forthwith canceled the contract, so advising the plaintiff in a letter stating that the reason for the cancella

tion was the plaintiff's attempt to buy tungsten in the open market for delivery under the contract.

At the trial of this case the Government made no effort to prove that the plaintiff had, in fact, attempted to buy tungsten in the open market to fulfill its obligations under the contract. The stated ground for the cancellation was therefore nonexistent. The Government argues that Mr. Larson had reason to believe that the stated ground existed. Whether he did or not is irrelevant. One may not repudiate his contract obligations upon the ground that he reasonably, though mistakenly, believed that the other party to the contract had breached it.

As we have said, the Government seeks to justify its cancellation of the contract on grounds other than the ground stated at the time of the cancellation. One of these is that the plaintiff would not have been able to perform the contract and that therefore the contract was a futile writing, the repudiation of which by the Government could not have harmed the plaintiff.

The ability of the plaintiff to perform the contract was the subject of discussion and investigation during the more than a year's time of negotiation of the contract. As we have said, the Government sent its own expert to study that very question and he made a detailed report recommending that the contract be made. When a party to a contract has canceled it before performance has even begun, it can hardly expect a court to exercise its conduct upon anything less than convincing evidence that the contract could not have been performed. Our findings show that we do not regard the Government's evidence as convincing.

Appendix A

The Government says that it was entitled to cancel the contract because of a violation of the contingent fee provision in the contract. This provision said:

> ARTICLE XVII. CONTINGENT FEES. The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage or contingent fee.

At the beginning of the negotiations for the contract Colonel Westbrook filed with the Government officials with whom he was dealing a copy of the written agreement which he and Pulvermann had with the plaintiff covering their employment and their compensation. This agreement appointed them exclusive sales agents of the plaintiff for securing contracts in the United States, Germany and Switzerland for the sale of specified metals, including tungsten. The agreement was for a period of five years, provided for a commission of 5 percent on all sales up to specified tonnages, and retained Westbrook and Pulvermann as industrial consultants without additional compensation.

Our findings show that both these men had unusual qualifications and experience for the work which they undertook for the plaintiff. The plaintiff was a newly organized enterprise. It had no sales agency and would

not have anything to sell unless it could secure contracts which would give stability to the tungsten mining industry for a considerable period of time. It hired Pulvermann and Westbrook as its exclusive sales agents for five years in the only countries in which there was a prospect of obtaining such contracts. They worked diligently for more than a year presenting the plaintiff's offer on its merits to the numerous Government officials who took part in the negotiations. They gave valuable assistance to the plaintiff as industrial consultants concerning the plaintiff's arrangements with its proposed suppliers of tungsten. We think Pulvermann and Westbrook were bona fide employees of the plaintiff.

The Government seems to urge that to be a "bona fide employee" of one contracting with the Government one must be an employee in the master and servant sense, with power in the master to control in detail the servant's activities. That is not the status of a sales agent, who may have several employers. We think the expression "bona fide employee" in the warranty clause in the contract must receive a rational interpretation consistent with its purpose.

In the years 1949 through 1951 an extensive investigation of "Influence in Government Procurement" was carried on by the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments. Hearings before the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments, 81st Cong., 1st Sess., pursuant to S. Res. 52 (August 8–September 1, 1949), and 82nd Cong., 1st Sess., pursuant to S. Res. 51 (March 14–October 5, 1951). Mr. Larson, who signed the contract in the instant case, was an important witness at these hearings. At the con-

clusion of the 1949 hearings Senate Report No. 1252, 81st Cong., 2d Sess., Jan. 18, (legislative day Jan. 4), 1950, certified. Mr. Larson's testimony at the hearings, and the comment of the members of the committee show that the warranty clause in question was not intended to forbid customary and honest business practices in negotiating contracts with the Government.

In the 1949 hearings referred to above, Mr. Larson's testimony at pages 616-617 is important. He told the committee about the regulation of his agency requiring one proposing to negotiate with his agency to disclose whether he had employed a firm other than a full-time employee to solicit the contract, and to agree to furnish information to the contracting officer as requested, relating to the employment. Mr. Larson said that from that information the contracting officer can ascertain

> whether or not in each individual case it is a legitimate attorney, as the chairman has pointed out, a full-time employee, even a contingent fee operation possibly being legitimate.
>
> . . . . . .
>
> And he will make the decision then and there."

In the instant case, as we have seen, the plaintiff's agents, at the outset of the negotiations, filed their employment agreement with the Government's negotiating officials. If those officials did not "then and there" decide that the agreement would not be a violation of warranty clause which would be inserted in any contract which might emanate from the negotiations, they recklessly involved numerous Government officials, and the plaintiff and its agents, in more than a year of strenuous negotiations and great expense, to no purpose. It might be suggested that

they knew that the compensation arrangement was improper, but did not raise the question because it would be at the Government's option whether to take advantage of the impropriety or not. Of course no such diabolical thought occurred to them. Their opinion at the time must have been that the compensation arrangement was not in violation of the warranty. We are not persuaded that they were wrong. And if the interpretation of the warranty and its proper application to the instant situation were doubtful, we think it would be a great wrong to permit the Government to awaken such a "sleeper" to justify its cancellation of a contract which it purported to cancel on another ground which it cannot now defend. Nothing short of a showing that the evils which the warranty provision was intended to prevent were present in the instant situation would justify such a use of it. The evidence shows that such evils were not present.

As appears from the foregoing, our conclusion is that the Government breached its contract with the plaintiff and must pay damages for the breach. We must determine how those damages should be measured. The plaintiff urges that it had the right, under its contract, to obtain tungsten from any source, including the open market; that the market price went down substantially during the period when it would have been performing its contract; that it could therefore have bought the tungsten at the low market price and delivered it to the Government at the higher contract price; and that it is entitled to recover the difference between the two prices.

We think the plaintiff did not have the right, under the contract, to deliver tungsten bought by it in the open market, except possibly to a minor extent. It was one of the Government's prime purposes in making the contract

to make possible the opening up and development of new sources of tungsten. The contract would not have been made except for the existence of that purpose, and both parties so understood.

The obtaining of tungsten from the mines from which the parties understood that it was to be obtained, would have been more costly than buying it in the open market after the market price went down. But, as we have said, the plaintiff was obligated to deliver tungsten from those mines. At best we can determine, its profit would have been $2.00 per short-ton unit. Since that is all that it would have made if it had been permitted to perform its contract, such a judgment will compensate it for the Government's breach of contract.

The plaintiff may have a judgment for $508,200.

It is so ordered.

BARKSDALE, *District Judge*, sitting by designation; LARAMORE, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

APPENDIX B

EXCERPTS OF EX-1

3.(b) Following are pertinent provisions of the contract:

WHEREAS, the Government is desirous of promoting the development of new sources of tungsten (wolframite) concentrates and in procuring tungsten concentrates in quantity; and

WHEREAS, the Contractor is desirous of increasing the productive capacity of its tungsten mines in Portugal (including the enlargement of its milling facilities) and the productive capacity of other small Portuguese producers with whom Contractor intends to merge, consolidate, or otherwise combine its efforts to secure increased production of tungsten.

Now, therefore, in consideration of the premises and the mutual promises of the parties hereto, as hereinafter set forth, the parties agree as follows:

ARTICLE I. SCOPE OF CONTRACT. Contractor agrees to sell and deliver to the Government and the Government agrees to purchase from the Contractor not less than two thousand nine hundred and seventy (2,970) short tons (of two thousand (2,000) pounds each), but not in excess of four thousand two hundred and ninety (4,290) short tons (of two thousand (2,000) pounds each) of tungsten concentrates (WO$_3$) at the prices and upon the terms and conditions hereinafter set forth.

ARTICLE III. RATE OF DELIVERY. Contractor shall make deliveries of tungsten not less often than semi-annually at the following minimum or maximum annual tonnage rates.

Appendix B

	Maximum Short Tons	Maximum Short Tons
1st Period	550	1081
2nd Period	880	1320
3rd Period	1540	3080

ARTICLE IV. PRICE DURATION OF CONTRACT. This Contract shall be for a period extending from date of execution hereof and terminating on June 30, 1955. It is understood and agreed that the price for each short ton of tungsten concentrates delivered in each successive period during the term of the contract, shall be determined on an f.o.b. vessel Portuguese port basis, including duties, taxes and all other levies imposed by any authority other than the United States Government, and at the following rates:

1st Period, expiring June 30, 1953 $57.00 per short ton

2nd Period, expiring June 30, 1954 $55.00 per short ton

3rd Period, expiring June 30, 1955 $50.00 per short ton

* * * * *

ARTICLE VIII. WEIGHTS AND PAYMENTS. Payment of the purchase price of tungsten concentrates delivered hereunder shall be made in the following manner:

(a) The Government will establish irrevocable commercial letters of credit opened in favor of the Contractor, in the Banco Nacional Ultramarino, Lisbon, Portugal, or in such other Portuguese bank as may be named by the Contractor and is acceptable to DMPA, in United States currency to

amounts in the aggregate adequate to pay all sums due during the respective periods hereunder as such sums become due against which provisional and final drawings may be made upon presentation of sight drafts accompanied by the documents and in accordance with the terms and conditions specified in subparagraphs (b), (c) and (d) of this Article. All costs in connection with the opening of the stand-by commercial letter of credit shall be for the account of the Contractor.

ARTICLE XII. OPTION. In consideration of the undertakings of the Government under this Contract, the Contractor hereby grants to the Government an option to purchase the Contractor's entire production or any part thereof of tungsten ores/concentrates meeting the specifications as of the date said option is exercised. This option shall continue in existence for a period of five (5) years from the date the last shipment of tungsten ore called for under this Contract is delivered to and accepted by the Government.

ARTICLE XIII. CONTINGENT FEES. The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Contract without liability or in its discretion to deduct from the contract price or con-

sideration the full amount of such commission, percentage, brokerage or contingent fee.

ARTICLE XX. DEFAULT. Notwithstanding any other provision of this Contract, the Government may, by notice in writing to the Contractor, cancel this Contract or any part thereof at any time, without payment of damages or penalty of any kind for such cancellation, in the event (a) a receiver, liquidator, or trustee is appointed for Contractor or its property [illegible] of the liquidation or dissolution of Contractor, whether voluntary or involuntary, (c) default by Contractor in the performance of any of the terms, conditions or covenants of this Contract or any amendment or supplement thereto, (d) of the determination by the Government that the Contractor obtained this Contract for the purpose of speculation.

ARTICLE XXIV. CANCELLATION. Notwithstanding any other provision hereof, this Contract shall automatically terminate upon the existence of any condition or conditions preventing the performance of any of the obligations hereunder, arising from an act or failure to act of the Government of Portugal. Such acts include, but are not limited to, the failure of that Government to authorize exports required by this Contract, and its failure to issue an export license necessary for the performance of the obligations hereunder (p. 101).

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No. 209

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
GEORGE COCHRAN DOUB,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
1. The findings with regard to the negotiation and terms of the contract	2
2. The findings with regard to damages	7
3. The opinion below	10
Argument	11
Conclusion	19

CITATIONS

Cases:

Brunswick-Balke-Collender Co. v. *Wisconsin Mat Co.*, 24 F. 2d 78 14

Burton Coal Co. v. *United States*, 60 C. Cls. 294 17

Dow v. *Humbert*, 91 U.S. 294 14

Hadley Dean Plate Glass Co. v. *Highland Glass Co.*, 143 F. 242 15

Hetzel v. *Baltimore & Ohio Railroad*, 169 U.S. 26 14

Illinois Cent. R. Co. v. *Crail*, 281 U.S. 57 14

Needles v. *United States*, 101 C. Cls. 535 14, 15

Rice v. *Schmid*, 18 Cal. 2d 382 15

Rockm v. *Horst*, 178 U.S. 1 15

Schlottman v. *Pressey*, 195 F. 2d 343 14

United States v. *Burton Coal Co.*, 273 U.S. 337 11, 12, 15, 16

United States v. *Purcell Envelope Co.*, 249 U.S. 313 15

Statutes:

Defense Production Act of 1950, 64 Stat. 798, § 304 4, 6

28 U.S.C. 2502 2

Miscellaneous:

27 Col. L. Rev. 87 (1927) 17

5 Corbin *on Contracts* § 1002 (1951) 14

Executive Order No. 10281, 16 F.R. 8789 4

McCormick on Damages, (1935) § 173, pp. 658 659 14, 15, 17

Seller's Recovery When Buyer Repudiates Before Completion of Manufacture, 99 U. Pa. L. Rev. 229 (1950) 15, 17

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 17–26) is reported at 180 F. Supp. 342.

JURISDICTION

The judgment of the Court of Claims was entered on January 20, 1960. The petitioner's motion for rehearing was denied on April 6, 1960. The petition for a writ of certiorari was filed on July 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims applied the proper measure of damages in the particular factual circumstances of this case.

2. Whether petitioner should have been given a second opportunity in that court to present further evidence on damages.

STATEMENT

This action was brought by petitioner in the Court of Claims for an alleged breach of its contract with the United States.[1] Under the contract, petitioner agreed to obtain tungsten from designated sources to be developed by it in Portugal, for sale and delivery to the United States. After a full trial, the court ruled that the United States had committed a breach of the contract, and awarded damages of $508,200 (Pet. App. 26). Since the sole question raised by the petitioner is the adequacy of the damages awarded, we shall set forth only those findings[2] and portions of the opinion below that deal with that issue.[3]

1. THE FINDINGS WITH REGARD TO THE NEGOTIATION AND TERMS OF THE CONTRACT

As the court below held (Pet. App. 25–26), one of the Government's "prime purposes in making the contract [was] to make possible the opening up and development of new sources of tungsten." In 1951, the

[1] The petitioner is a Portuguese corporation, and its suit was properly before the Court of Claims under the reciprocity provisions of 28 U.S.C. 2502.

[2] The court's "voluminous findings of fact" "coincide[d]" with those of the trial commissioner (Pet. App. 18).

[3] In holding against the Government, the court rejected the contention that there had been a violation of the provision in the contract against payment of contingent fees for securing it. The facts relating to that issue are set forth in a conditional cross-petition, which the United States is filing simultaneously herewith.

United States was concerned about the adequacy of the tungsten sources in the world available to it (F. 21–23).[1] On July 1, 1951, the Director of Defense Mobilization stated that new tungsten mines had to be developed in "Marshall plan countries" and that long-term contracts and loans might be utilized to accomplish this purpose (F. 22).

Although Portugal was a leading western nation in reserves of tungsten (F. 21(b)), its tungsten industry had suffered from lack of both a stable world market and development and organization of its mines (F. 24–30). It was essentially a "pick-and-shovel operation", conducted in large part by "pilhas", the Portuguese term describing individual peasants and their families (F. 24(e), 29(a)). Moreover, any attempt to organize a profitable tungsten industry in Portugal was hampered by stringent Portuguese government controls, including heavy license and export taxes (F. 25, 26). After World War II, the Portuguese tungsten industry was in a depressed and unorganized state, using archaic patterns of mining and marketing (F. 28, 29).

In June 1951 three men conceived the idea for the petitioner's formation—a Portuguese citizen, Dr. Soares, who had a plan to organize and develop certain tungsten sources in Portugal, and two Americans, Colonel Westbrook and Mr. Pulvermann, who were to seek a potential purchaser for any company that might be formed on the basis of Dr. Soares' plan (F. 31, *et seq.*). After considering possible capital

[1] "F" refers to the pertinent finding of the court below.

sources and contracts, Colonel Westbrook and Mr. Pulvermann determined to seek a long-term contract with the United States (F. 31, *et seq.*). During ensuing protracted negotiations with the United States, these men dealt primarily with officials of the Emergency Procurement Service of the General Services Administration, which was essentially responsible for obtaining tungsten for stock piling; and with officials of the Defense Materials Procurement Agency (DMPA) (the agency with which the contract was finally negotiated), which was charged by law with the responsibility for encouraging the exploration, development and mining of critical and strategic minerals and metals (F. 11-20).

In one of his first overtures to the American Government, Colonel Westbrook, in a memorandum dated July 24, 1951, stressed the need of the United States to counter Russian acquisition of tungsten sources with development of sources in Portugal through Companhia Atlantica (F. 43). Indeed, from the outset, petitioner's attempts to obtain a contract were consistently based on the asserted mutual needs of the parties, *i.e.*, the need of the United States for developed tungsten sources in Portugal for which it would be willing to enter into a long-term, fixed-price contract, and the need of the petitioner for such a contract, by means of which it could profitably organize and develop its affiliated Portuguese mines despite volatile world tungsten prices and heavy Por-

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[1] The pertinent provisions of the Defense Production Act of 1950, 64 Stat. 798, and of Executive Order No. 10281, 16 F.R. 8789, are set forth in Findings 16 and 18.

tuguese taxes (F. 43, *et seq.*). The modernization and expansion of these mines as considerations calling for a long-term contract with the United States were again emphasized by Colonel Westbrook in a letter of September 13, 1951, to DMPA officials, which reported the incorporation of the petitioner and the names of its officers and affiliated mining companies (F. 51).

In October, 1951, the petitioner made a written offer that similarly reflected the purpose to produce and furnish tungsten to the United States from its affiliated mines in Portugal (F. 58(a), (b), 60(a)). The petitioner submitted to United States officials proof of its ability to produce the tungsten from these mines (F. 60(c), (d), 61(c)). This purpose underlies practically all subsequent written communications between the parties prior to execution of the contract. For example, Colonel Westbrook's letter of November 17, 1951, again emphasized increasing the production of tungsten in the petitioner's Portuguese mines (F. 63(b)); in another memorandum, he stressed the importance of giving the United States a "dependable future market" in Portugal (F. 64(b), (c)); and, in his report of December 19, 1951, Colonel Westbrook once again summarized the developmental

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The legal relationship between petitioner and its affiliated mines is set forth in Findings 64 and 65. Essentially, petitioner entered into contracts with its affiliated mines, under which the mines were to sell their production of tungsten to petitioner for performance under petitioner's long term contract with the United States. Petitioner also proposed to aid these affiliated companies with financing and equipment (F. 64, 65, 66).

nature of the venture (F. 66). When United States government officials insisted that, since tungsten could be obtained by spot purchases on the open market, the fixed prices suggested by the petitioner should be lowered because of the burden of a long-term contract (F. 72(c)), Colonel Westbrook wrote these officials, on behalf of the petitioner, that (F. 73(a)):

> * * * a policy which puts a premium on spot prices, as compared with prices offered for increased production requiring producers to make heavy expenditures for the necessary expansion of their facilities, defeats the basic purpose of the legislation enacted by Congress to increase the availability of the product. * * *

Following further negotiations, the submission of additional engineering reports as to the prospective ability of the petitioner's mines to produce, and an on-the-spot investigation of this latter question by an American engineer, the parties turned to drafting an acceptable agreement (F. 79, 81, 84). Money for the contract was made available, under § 304 of the Defense Production Act of 1950, to the Defense Materials Procurement Administrator, who, as we have noted, *supra*, p. 4, was primarily responsible for the exploration, development and mining of critical metals (F. 100(a), 18(c)).

On September 11, 1952, the contract between the petitioner and the United States, acting through the Defense Materials Procurement Agency, was signed (F. 104). It provided, in essence, for the delivery of tungsten by the petitioner to the United States at fixed prices during a three year period (F. 3(b))

and gave the United States the right to cancel the contract if the Government determined, *inter alia*, that the petitioner had obtained it for the purpose of speculation (F. 3(b)). The contract recited the following underlying premises (F. 3(b)):

> WHEREAS, the Government is desirous of promoting the development of new sources of tungsten * * * concentrates and in procuring tungsten concentrates in quantity; and
>
> WHEREAS, the Contractor is desirous of increasing the productive capacity of its tungsten mines in Portugal (including the enlargement of its milling facilities) and the productive capacity of other small Portuguese producers with whom Contractor intends to merge, consolidate, or otherwise combine its efforts to secure increased production of tungsten * * *

The contract was cancelled by the Government a little more than one month later when officials in Washington were informed that the petitioner was purchasing tungsten in the open market for delivery under the contract (F. 122(b), 123). The petitioner attempted unsuccessfully to reinstate the contract, claiming that it was not buying on the open market and that it was ready to perform the terms and conditions of the contract (F. 127). The petitioner had never produced any of the tungsten for the contract at the time of cancellation, its mines remaining nonoperative (R. 23).

2. THE FINDINGS WITH REGARD TO DAMAGES

The Court of Claims found that one of the purposes intended by the Government to be served by

the contract was the expansion of tungsten production in Portugal, and that this fact was known by the petitioner's representatives who negotiated the contract (F. 140(a)); that one of the purposes contemplated by the petitioner from the contract was the expansion of production in its affiliated mines in Portugal, a fact known to United States officials who negotiated the contract (F. 140(b)); and that the prices under the contract were based more on the production and expansion costs of marginal producers than on market prices (F. 140(a), fn. 16).

The court further found that in September 1952, when the contract was signed, the world demand for tungsten had been slackening for some time and accompanying price declines had occurred (F. 154). These declines had been under way long enough to dry up sources of supply both in the open market and from the pilhas in Portugal (F. 154). The court found that the petitioner could not have obtained tungsten in the open market, and had to depend for its supplies solely on its affiliated mines and whatever it could obtain from Portuguese pilha production (F. 154).[7]

As for the negotiation and terms of the contract itself, the court found that the basic amount of

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[7] The trial commissioner concluded that the United States did not cancel the contract "to escape one commitment to buy tungsten in order to procure the same commodity at a lower price". He found the reasons for cancellation had nothing whatever to do with the drop in the market price. His extensive findings, adopted by the court below, fully support this conclusion.

tungsten to be delivered under the contract was intended by the parties to be produced by mines owned by or affiliated with the petitioner in Portugal (F. 155(a)). It noted that the contract permitted delivery of an overrun of tungsten (an amount over the required amount), and that the parties intended that most of the overrun would also be obtained from Portuguese production, through purchases from Portuguese pilhas, pickers and dealers (F. 155(b)). The court further found that, at the time of the contract negotiations, the parties recognized that "some of the overrun might have to be acquired by purchases in the open market", but that the negotiators, at the time, were unaware of the depletion of the available supply on the open market due to the decline in demand and prices (F. 155(b), (c), fns. 63 and 64); and that market conditions existing at the time the contract was signed would have made it necessary for the petitioner to rely solely on Portuguese production alone (F. 155(c)).

The court found that if the petitioner's damages were ascertained by the rule of contract price less cost of performance (which assumed that the petitioner had to supply the tungsten for this contract from its Portuguese sources), the loss, based on the evidence introduced on cost of performance, was $508,200 (F. 161–168). However, if the petitioner's damages were calculated on the basis of contract price less market price (which assumed that the petitioner could supply the tungsten from open market purchases), it would be entitled to $6,166,455.25 (F. 156–

160).* Since it had found that the petitioner was limited by the contract to the Portuguese sources of supply and was not free to shop in the open market, the court concluded (F. 157) that the petitioner's loss from the cancellation of the contract "is reflected by the difference between the contract price and the cost of performance", and awarded damages of $508,200.

3. THE OPINION BELOW

In its opinion (Pet. App. 25–26), the Court of Claims again rejected the petitioner's contention that, had the contract remained uncancelled, it was free to purchase tungsten in the open market for delivery to the United States; and that it was therefore entitled to damages based on the difference between contract price and market price. The court stated that the contract required the petitioner to supply tungsten from the Portuguese sources of production, and that both the petitioner's offer and the Government's ultimate acceptance were based upon, and would not have been made without, "the opening up and development of new sources of tungsten" (Pet. App. 26). It pointed out (*ibid.*) that, since the total damages awarded were "all that [the petitioner] would have made if it had been permitted to perform its

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* The difference between market price and cost of performance is due to the two factors noted by the court below: (1) the slackening of world market demand and resultant price decline of tungsten even before the contract here was negotiated in September 1952, and (2) the high cost of production and performance in Portugal.

contract, such a judgment will compensate it for the Government's breach of contract."

The petitioner filed a motion for rehearing, seeking another opportunity to introduce evidence on cost of performance, on the ground that it had tried the case on the theory that contract price less market price was the applicable rule of damages. The Court of Claims denied the motion.

ARGUMENT

The petitioner contends (Pet. 8–14) that the contract here was a simple "purchase and sale" agreement (Pet. 8), under which it was free to obtain the tungsten through open market purchases; and that under the rule of *United States* v. *Burton Coal Co.*, 273 U.S. 337, the proper measure of damages in such a case is the difference between contract price and market price, and not between contract price and cost of performance. This argument, however, ignores the specific and detailed findings of the Court of Claims that the contract required the petitioner to obtain the tungsten from Portuguese sources, and that it could not obtain the metal in the open market. This factual determination as to the petitioner's rights under the contract, upon which the court below based its measure of damages, is fully supported by the court's lengthy subsidiary findings; it distinguishes this case from *Burton Coal*, where the contract permitted the seller to purchase on the open market (see *infra*, pp. 15–18). This case, therefore, presents no important issue on the law of damages, but only the correctness of the findings below that the contract

obligated petitioner to supply tungsten from Portuguese sources; and there is no conflict with *Burton Coal*.[*] Accordingly, there is no occasion for further review by this Court.

1. The subsidiary findings of the Court of Claims, which underlie its ultimate finding that the petitioner was not free to purchase tungsten in the open market, are summarized in the Statement, *supra*, pp. 2–10. The petitioner makes no attempt to show that these findings are erroneous. The findings are supported both by the history of the lengthy negotiations between the petitioner's representatives (Colonel Westbrook and Mr. Pulvermann) and the Government officials, and by the preamble to the contract itself, which states that the Government "is desirous of promoting the development of new sources of tungsten * * * concentrates" and that petitioner is "desirous of increasing the productive capacity of its tungsten mines in Portugal * * * and the productive capacity of other small Portuguese producers * * *" (F. 3(b)).

The petitioner's contention that the contract sanctioned open-market purchases further ignores the fact that the petitioner itself asserted throughout the negotiations that a long-term, fixed-price contract was not unduly burdensome to the United States, since

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[*] Contrary to the petitioner's assertion (Pet. 11), the court below took specific notice of the petitioner's reliance on *United States v. Burton Coal Co.*, 274 U.S. 337, discussed *infra*, pp. 15–18, and apparently considered such reliance unwarranted in view of its finding that the petitioner was not entitled under the contract to supply tungsten from the open market (F. 157, fn. 67). See also the extensive discussion of *Burton* in the trial commissioner's opinion.

the latter would obtain the benefit of a newly developed source of supply for the future in place of the usual delivery from the open market.[10] The claim also ignores the petitioner's denial, both upon receipt of the notice of cancellation and during this litigation, that it was operating in the open market.[11] In view of the year and a half of negotiations in which the petitioner endeavored to convince Government officials that it was capable of financing its developmental project in Portugal and of producing tungsten from the developed sources, and its procurement of the contract on such proof of ability to perform, the petitioner's present contention that the contract merely reflected the hope of Portuguese production, but not a firm commitment, is but a belated afterthought.

The finding of the Court of Claims that, at the very end of the negotiations, the parties contemplated that a small amount of the first period overrun might have to be obtained through purchases on the open market (F. 155(b), 141(b), 153, fn. 59), is in no way inconsistent with the court's conclusion that the contract was basically one for tungsten produced in Portugal. Moreover, the court found that even this minor portion of the overrun could not have been obtained from

[10] See *e.g.*, the letter of Colonel Westbrook, described in Finding 73(a), *supra*, p. 6.

[11] As the trial commissioner below observed in his opinion, "[the petitioner] cannot have it both ways: that the contract was for the sale and delivery of tungsten without regard to the development of mining resources *and* was not obtained by [the petitioner] for the purpose of speculation. The entire history of the origin of Atlantica and the negotiation of the contract with DMPA rests upon promotion of production and mining". (Emphasis supplied.)

non-Portuguese sources, since the decline in world demand had dried up the open market in tungsten (F. 155(c), 154).

2. The petitioner further errs in its assumption (Pet. 8–9) that the general rule of damages for breach of a purchase and sale contract is the difference between contract price and market price. Passing the fact that the court below here found that this was not such a contract (see *supra*, pp. 8–11), there is, we submit, no such general rule of damages in these cases. Rather, the basic principle of damages is that the party injured by a breach of contract is entitled only to those damages which may be said to arise naturally from the breach and which were within the reasonable contemplation of the parties at the time the contract was made. *E.g., Hetzel* v. *Baltimore & Ohio Railroad*, 169 U.S. 26, 37; *Doe* v. *Humbert*, 91 U.S. 294, 299; *Schlottman* v. *Pressey*, 195 F. 2d 343 (C.A. 10); *Needles* v. *United States*, 101 Ct. Cls. 535; *McCormick on Damages*, § 173 (1935).[*] There are no rigid rules applicable in all cases but only flexible guides dependent upon the particular factual circumstances involved. *Illinois Cent. R. Co.* v. *Crail*, 281 U.S. 57, 64–65; *Brunswick-Balke-Collender Co.* v. *Wisconsin*

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[*] As Professor Corbin puts it, 5 Corbin *on Contracts* § 1002 (1951):

> The rules of law governing the recovery of damages for breach of contract are very flexible. Their application to the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court leaving much to the individual feeling of the court created by the special circumstances of the particular case.

Mat Co., 24 F. 2d 78 (C.A. 7); *Needles* v. *United States*, *supra*.

Where, prior to performance by the seller or producer, a purchase and sale contract is repudiated by the buyer, the ordinary measure of damages is the difference between the contract price and the cost of performance. *United States* v. *Purcell Envelope Co.*, 249 U.S. 313; *Rockm* v. *Horst*, 178 U.S. 1; *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F. 242 (C.A. 8). Although damages measured by contract price less market price may be awarded where the cost of performance would be greater than market price, this is done only where the seller or producer is free to obtain the goods on the open market. *Rice* v. *Schmid*, 18 Cal. 2d 382, 388; *McCormick on Damages*, § 173, pp. 658–659 (1935). See also note, *Seller's Recovery When Buyer Repudiates Before Completion of Manufacture*, 99 U. Pa. L. Rev. 229, 234 (1950). The rationale is that, if the market price drops and if the seller is free to purchase on the open market, the fair measure of his loss resulting from the breach must reflect the fact that his profits would have been greater had he purchased on the market instead of delivering his own production. Where, however, as here, the contract does not permit open market purchases, the normal rule measuring damages by the difference between contract price and cost of performance fully compensates the seller for the damage he suffered from the breach.

United States v. *Burton Coal Co.*, *supra*, is not, as the petitioner contends, in conflict with the decision below. In *Burton*, the United States entered into a

fixed-price contract with a supplier of coal to purchase coal for army camps during World War I. While the contract identified several mines as the seller's source of supply, it further provided that the seller "might furnish coal from other mines if, for any reason for which it was not responsible, it should be unable at any time to furnish coal in sufficient quantities from the mines mentioned" (273 U.S. at 338). After accepting some coal, the Government "refused to take or pay for any more," although the seller "was ready to deliver the balance" (p. 339). The Court of Claims awarded damages based on the difference between the contract price and the market price. This Court, in affirming, held (p. 340) that "[t]he contract was not for production or mining, but for sale and delivery of coal." It pointed out (*ibid.*) that the seller "was bound to deliver the quantity of coal covered by the contract"; that "[f]ailure of the sources referred to in the contract would not excuse it"; and that "[i]n contemplation of law it could have obtained the coal at market prices prevailing at the times when deliveries were required under the contract."

In other words, from the Government's point of view the essential purpose of the contract in *Burton* was to obtain coal; and the designated sources were merely incidental, not crucial. Here, on the other hand, as the findings establish, the crucial element of the contract, and the reason for its execution, was the development of new sources of tungsten in Portugal. This contract, therefore, was one "for production, or

mining" and not just "for sale and delivery," of tungsten.[*]

There is another significant distinction between this case and *Burton*. In *Burton*, as the trial commissioner here noted, the Court of Claims had emphasized that the apparent motive for the Government's cancellation of the contract was the fact that it could have obtained the coal on the open market at a lower price than the contract provided. *Burton Coal Co.* v. *United States*, 60 C. Cls. 294, 314. In that situation, awarding damages to the seller based on the difference between contract price and cost of performance would result in a windfall to the Government, which had broken the contract. In the instant case, on the other hand, as the trial commissioner concluded (based on his extensive findings adopted by the Court of Claims), the primary motive for the Government's cancellation was its honest belief that the petitioner was speculating in the open market; the cancellation was not related to the drop in the open market world tungsten price. Since the petitioner was not free to satisfy the contract through open market purchases, the Court of Claims correctly found that damages based on the difference between

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[*] See *McCormick on Damages*, § 173, pp. 658-659 (1935), and Note, 27 Col. L. Rev. 877 (1927), for comments on the *Burton* decision. Both commentators conclude that the rule of damages applied in *Burton* is only justified in view of the construction of the contract there as allowing for purchases by the supplier on the open market. See also, Note, *Seller's Recovery When Buyer Repudiates Before Completion of Manufacture*, 99 U. Pa. L. Rev. 229, 234 (1950).

contract price and cost of performance fully compensated petitioner for the "extent of the loss suffered by [it] in consequence of [the Government's] cancellation of the contract * * *" (F. 157). In these circumstances, awarding damages to petitioner on the basis of the difference between contract price and market price would result in a windfall to it of more than $5,000,000.

3. There is no merit to the petitioner's contention (Pet. 14-15) that it should have been given an opportunity to introduce additional evidence on the damages question. The argument is that the petitioner presented its case under the belief that *Burton Coal* was applicable, and did not anticipate that another measure of damages would be applied; and that it has additional evidence relating to cost of performance that would establish a greater loss of profits than that found by the Court of Claims. The petitioner, however, was specifically apprised during the trial of the Government's theory of damages (Tr. 2210-2220), and was thus fully on notice that its own theory was being contested. The petitioner had full opportunity at the trial to introduce all its evidence on the damages issue, but elected not to do so. It is not entitled to a further trial on the damages question merely because the Court of Claims rejected its legal theories.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1960.

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Supreme Court, U.S.
FILED
OCT 1 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 209

COMPANHIA ATLANTICA DE DESENVOLAIMENTO E EXPLORACAO DE MINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

The Market Value Measure of Damages Applies by Operation of Law Because the Contract on its Face is a Purchase and Sale Agreement and Not a Contract for Production

Respondent's brief subtly walks around the central object to which this Court's attention should be directed namely, the contract at issue. For the convenience of the Court petitioner has printed in Appendix B to its peti-

the Court of Claims has found the prices existing at the dates on which the contract required delivery (Pet. 4).

The speculative conclusions of the Court of Claims as to how petitioner would have performed the contract not only lack any basis in its own factual findings but fail to possess legal consequence. These conclusions, and respondent's arguments in support of them, overlook the basic principles that the law does not permit a party or the courts to rewrite a contract, and that the law does permit a contracting party to change his purpose and his method of performance if the change does not conflict with what he agreed to do under his contract. This is why we consider this case, in its present posture, to rest on erroneous conceptions of fundamental law, and why we consider the obligations of the contract, as written, to be the crux of the question presented by this petition.

The contract here is clearly a simple agreement for the purchase and sale of tungsten. Article I sets out the quantities to be bought and sold. Article III specifies the rates of delivery and Article IV sets forth the price. There is no provision which expressly or impliedly requires the petitioner to produce any tungsten, obligates it to develop mines or increase Portuguese production or limits the sources from which petitioner may acquire tungsten for resale to the Government.

The utter absence of any such obligation or restriction is illuminated by respondent's failure to refer in its brief to the terms of the contract. Instead, respondent quotes what it calls the "underlying promises" of the contract (in other words, the recitals in the preamble to the contract (Resp. 6). Such recitals, however, do not constitute contract obligations. Indeed, when the recitals in a contract are inconsistent with the obligations expressed

in the body of the contract, the recitals must give way. . . ." *Wilson v. Travers*, 56 Fed. 2d 139, 143 (4th Cir. 1932); *Barnes v. Brooklyn*, 165 N. Y. 80, 58 N. E. 765 (1900). Respondent's reliance on the recitals is an admission that it cannot find anything in the contract to elevate the "desires" expressed in the preamble to the status of contract obligations.

Respondent's brief points to no contract term claimed to be unclear or ambiguous. There is no reason why this Court should not determine from mere inspection of the provisions printed in Appendix B that the contract is an unrestricted purchase and sale agreement to which the market value rule applies, not as a means for determining cost of performance (as concluded by the Court of Claims), but directly, by operation of law, as a means for determining damages for breach.

The Determination by this Court that *Burton Coal* Applies to the Contract at Issue Does Not Require this Court to Redetermine Any Fact Found by the Court of Claims

Respondent's principal argument is that the market value rule applied in *Burton Coal* does not apply here because the contract did not permit petitioner to obtain suppliers on the market. This statement of petitioner's rights under the contract is said to be a "factual determination" based upon "specific and detailed findings of the Court of Claims." Therefore, the case is said to present only the correctness of findings below (Br. 11-12). This is not true.

The interpretation of a contract, while it may depend upon factual determinations, is not itself a factual determination, but a determination of law. Moreover, respondent gives no reference to the "specific or detailed

findings" that "[n]one of the contract provisions could be interpreted [as] requiring petitioner to open up additional mines or to expand its milling facilities." Pet. App. 25a. That finding is not challenged. Rather, the district court concluded that petitioner's obligation to "use its best efforts to produce and sell" tungsten ore "to the end that the purposes intended to be served by the contract as such" could be fulfilled only by opening up additional mines. Pet. App. 25a-26a. But the district court did not explain how the purposes intended to be served by a contract could be the same as the obligations of the contract. Nor do the findings support respondent's claim. The evidence speaks of what the parties intended when they made the negotiations, not of the rights and obligations expressed in the contract.

While expressions by the parties during the course of negotiations may serve to elucidate ambiguous contract terms, this contract is not ambiguous, nor does respondent claim that it is. The truth is that the negotiators understood very well that their mutual purposes would best be served by a long-term purchase and sale agreement, not a development contract. The contract went through several drafts prepared by experienced Government lawyers. Language obligating petitioner to open up mines and provide additional milling facilities and restricting the source of deliveries was inserted in the first draft by a DMEA attorney who was unfamiliar with the prior negotiations. Upon objection by one of petitioner's representatives this language was rewritten to express simple obligations to buy and sell (Pet. App. 97a-98a, fn. 6).

The Court of Claims concluded that petitioner did not waive its right to deliver tungsten bought in the market "to a minor extent" (Pet. App. 25-26a), but this can hardly be called a factual determination, or even a reasonable inference. The conclusion was not predicated upon the terms of the contract but upon the court's view that it was one of the Government's prime purposes in making

the contract to make possible the opening up and development of new sources of tungsten." Petitioner contends that this was one of the Government's prime purposes, the other being to satisfy the pressing needs of its stockpile, but submits that the purposes which motivated the parties to enter into the contract ought not to be confused with the obligations which they assumed. This basic confusion of purpose with obligation has resulted in the plainly erroneous legal conclusion (Pet. 11-15) which this Court may and should review.

Nor is petitioner merely asking this Court to review an erroneous interpretation of a contract. The error in interpretation was part and parcel of the refusal to apply *Burton Coal*. The Court of Claims knew very well that petitioner was relying on *Burton Coal*. The commissioner's opinion and petitioner's briefs and oral argument repeatedly thrust *Burton Coal* upon the court's notice as presenting the principal issue in the case. This is what makes it strange that the court not only failed to discuss or adopt any of the various arguments suggested by the commissioner to get around *Burton Coal*, but did not even allude to the case in its opinion. Petitioner submits that it should not be possible to avoid review of a determination of law in conflict with *Burton Coal* by reading into a contract restrictions and obligations for which there are no legal basis.

The Parties' Purposes Did Not Preclude Acquisition of Portuguese Tungsten at Market Prices

Even if the purposes with which the parties contracted are, erroneously, treated as obligations of the contract, they do not justify a departure from the rule of *Burton Coal*. The purposes have, however, been misstated in respondent's brief.

Nor can it be concluded that petitioner could not have purchased at market prices from mines it selected as suppliers. The Court of Claims found that petitioner might have acquired substantial quantities of tungsten ores at prices below the 60 escudos per kilogram ($29.31 per short ton unit) mentioned in commitments from some of such mines (162). But these commitments covered only a small part of the ore to be acquired by petitioner (8). Nor was petitioner committed to them. It was free to develop whatever mines offered the best prospects among the 800 registered and proven concessions. The Government did not specify, nor did it care, what mines petitioner chose. That is why the Court of Claims could not be specific and could do no better than refer to "the mines from which the parties understood that it [tungsten] was to be obtained" (Pet. App. 26).

In sum, while it was the mutual goal to increase Portuguese production, the instrument was simply a long-term purchase contract which gave petitioner the power to work towards the desired goal. The manner of accomplishment was left to petitioner. This was not a development contract. Neither was it a production contract. Petitioner was a middleman free to select its own suppliers. The Government lent no money and granted no premiums. It required strict adherence to a schedule of minimum deliveries. Failure of its sources would not excuse petitioner.

It is difficult to understand respondent's contentions (Resp. 15-17) that the foregoing purposes, even if erroneously treated as contractual obligations, distinguish the situation from *Barton Coal*. Respondent notes that in the Barton contract the seller might, under appropriate circumstances, furnish coal from mines other than those particularly named in the contract. But here petitioner from the outset could supply tungsten purchased from any of 880 concessions. Respondent notes that in Barton the seller "was bound to deliver the quantity of coal covered by the contract", but petitioner here was equally bound to deliver the quantity of tungsten specified in its contract.

Respondent goes on to speculate that in *Barton* the Government's essential purpose was to obtain coal, and the designated sources were merely incidental, not crucial, whereas here the crucial element was the development of new sources of tungsten. If so, why did it not only omit any obligation for development but agree to remove even a general reference to mines from the terms of the Atlantica contract? Even the preamble to the Atlantica contract, on which respondent rests its position, discloses the Government's conjoint desire of "procuring tungsten concentrates in quantity."

It is just as true here as in *Barton* that the only parties to the contract were the Government and the selling company, that no contract relation existed between the Government and any of the mining companies, and that their default would not make them liable to the Government or relieve the selling company from its obligation to deliver (273 U. S. at 340).

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tungsten for stockpiling. The negotiations were transferred to the DMEA panel for technical reasons (Pet. 4). DMEA had authority under the Defense Production Act and by Executive Order to make straight purchase contracts as well as loans and developmental contracts (Sec. 302(a)(1) of Finding 16 and Sec. 303 of E.O. No. 10281, Finding 18(c)).

pose to buy on the market was of controlling significance. But this premise is erroneous because it misses the whole point of *Burton Coal*. The market value rule there is applied by operation of law without regard to the cost of performance or amount of profits (273 U. S. at 344). Both were held in that case to be immaterial.

The Rule in *Burton Coal* is the Accepted Rule for the Buyer's Breach of a Sales Contract

Petitioner rejects as unsound the statement by respondent that there are no rules of damages but "only flexible guides dependent upon the particular factual circumstances involved" (Resp. 14). It is true that different rules may prevail in different situations, illustrated by the cases which respondent cites; but this does not mean that no rules exist. The market value rule is the accepted rule for the buyer's breach of a sales contract. Uniform Sales Act, 64(3); 3 Williston, *Sales* (rev. ed. 1948) 582. The rule is applied to anticipatory breaches as well as to refusals to accept delivery when due, e.g. *Eugene B. Smith & Co., Inc.*, 212 F. 2d 338, 340 (5th Cir. 1954). It was so applied in *Burton Coal* by this Court, which called it a "rule of law" (273 U. S. at 340) and refused to limit the seller's recovery to the difference between the contract price and the probable cost of performance.

Petitioner submits that the established rule, adopted by this Court as the law of Government contracts, may not be disregarded or upset by the Court of Claims.

Respondent suggests that the Government's motive for cancelling this contract, characterized as its "honest belief" that petitioner was speculating, justifies a departure from *Burton Coal*, where the Government's "apparent" motive was to profit from a drop in the market price (Resp. 17-18). Assessment of the relative depravity of the Govern-

ment's various bonuses would certainly afford a "[illegible] good" for setting damages, but hardly a reliable one. In any event, the motive for cancellation has no bearing on the application of the market value rule. Petitioner is not seeking punitive damages. This Court in *Reading Co.* did not deem the Government's motive worthy of comment. As for its "shoot-hole" hope, the Court of Claims found that the administrative determination to forego enforcement of the contract for purposes of speculation was "reasonable and not [illegible]" (143a-144a).

Equally without basis in the findings is respondent's assertion that application of the market value rule would give petitioner a windfall of more than $5,000,000 (Resp. 18). The findings conclude that the assumed costs of performance were maximum costs based on fragmentary evidence (162a-163a, 167a-168a). Discussing the anticipated remission of Portuguese export taxes, the Court said:

> "Absent the tax, Atlantica might have made a profit in excess of $5 million." (167a-168a, fn. 7a)

The windfall argument, which in any event is untenable because this Court disposed of it as immaterial in *Reading Co.* (273 U. S. at 331), is therefore not available to respondent in this case.

The utter inadequacy of the damages found by the Court of Claims, even under its theory, is the reason why petitioner seeks, alternatively, an opportunity to establish at least its out-of-pocket damages on the basis which that court has adopted (Pet. 11-15). The difficulty of making such proof—a difficulty caused by respondent's repudiation of its obligations at the very outset of a [illegible]

your contract permitting, even under the court's theory, complete freedom to petitioner in the selection of its suppliers and terms of supply. It demonstrates the wisdom of the policy underlying the market value rule followed by this Court in *Eastern Coal*.

CONCLUSION

For the reasons given it is submitted that the Court should grant this petition.

Respectfully submitted,

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FILED
OCT 5
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Supreme Court of the United States

BRIEF OF AMICI CURIAE, LAWRENCE WESTBROOK AND HEINZ PULVERMANN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORAÇÃO DE MINAS,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent.
No. 200

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF AMICI CURIAE

This brief of LAWRENCE WESTBROOK and HEINZ PULVERMANN as *amici curiae* is being filed pursuant to Rule 42 of the Rules of this Court, permission to the filing of such a brief having been granted by both the petitioner and the Government.

INTEREST OF AMICI CURIAE

Both Westbrook and Pulvermann have a deep interest in the outcome of this case. This interest springs first from the fact that the breach of the contract by the Government between petitioner (Atlantica) and the Government has destroyed their right to compensation from Atlantica of $67,975,000 (Finding 165) — a right which Atlantica has acknowledged was "incurred, as a matter of law, upon its

acceptance of the defendant's purchase contract and was not extinguished by the defendant's breach of that contract." (Petitioner's Second Motion for Rehearing before the Court of Claims, p. 2.) This very substantial right could obviously not be satisfied out of the judgment for $500,200.00 rendered by the Court of Claims.

Secondly, the Government has filed a conditional cross petition for certiorari (No. 383) challenging the standing of Westbrook and Pulvermann as bona fide employees of sales agencies of Atlantica, claiming that Westbrook and Pulvermann were so-called "five percenters" within the meaning of Article XVII of the contract in issue and thus raising issues as to the integrity and standing of Westbrook and Pulvermann in opposition to the specific findings of the court below that these gentlemen were bona fide employees of Atlantica and had rendered substantial service to that company. (Findings 135-137, 6-10.)

It was because of these interests—their theoretical dismission by the court below but their practical denial so far as damages are concerned—that Westbrook and Pulvermann after the judgment below took the extraordinary course of filing a motion to intervene in the court below, which motion was denied.

ARGUMENT

Position of Westbrook and Pulvermann

The position of Westbrook and Pulvermann is that the petition of Atlantica for a writ of certiorari should be granted inasmuch as the decision below by applying the wrong rule of damages deprives them of very substantial rights. On the issue of the grant of the cross petition for certiorari by the Government, they neither oppose nor support it. They are confident that any review of the record in this case will support their position as bona fide employees

The Rule of Damages Applied by the Court Below

Westbrook and Universal contend that the Court of Claims applied a rule of damages in direct conflict with the applicable rule of the difference between the contract and market prices as set forth by this Court in *United States v. Burton Coal Co.*, 273 U. S. 337, an express ground for the granted certiorari (Sup. Ct. Rule No. 19, 2), the absence of the apparent plain applicability of the *Burton* rule, evidence as to the costs of performance were introduced by Atlantic, and [illegible] that the record below is [illegible] to justify the [illegible] the Court below [illegible] the costs of performance [illegible] and [illegible] justify the remand of this case to the Court of Claims for the *Burton* rule were deemed inapplicable and the [illegible] rule to be applied would be the difference between the contract price and the cost of performance. As this Court's review of the findings of the court below is limited to [illegible] *United States v. Wilson*, 385 U. S. 190, 207 [illegible] of the existing scope of review possessed by this Court, the [illegible] below [illegible] to the Court.

(1) Applicability of the *Burton Coal* rule.

The applicability of the *Burton Coal* rule [illegible] as has been already set forth in petitioners' brief [illegible] and [illegible] is [illegible]. Here, as in *Burton*, [illegible] was bound to deliver the quantity of coal [illegible] by the contract." *Burton Coal*, supra

n. 340. Here, as in *Burton Coal*, "there was no contract relation between appellant [Atlantica] and any of the supplying companies. Their default would not make them liable to appellant [the Government] or relieve appellee [Atlantica] from the obligation to deliver coal [tungsten] to appellant [the Government]." *Ibid.* Here, as distinguished from *Burton Coal* the contract did not specify certain mines from which the production was to be made. *Id.* 338. Indeed, the final contract of September, 1952 did not restrict Atlantica's supply to any specific mines. Here, as distinguished from *Burton Coal Id.* 338 n. 1, there was no requirement that the ore contracted for must come from certain specified mines unless production at these mines was halted by *force majeure*. On the contrary, it was recognized by both parties from the outset that substantial quantities of tungsten would have to be acquired from other sources, primarily pillage, small independent producers and to meet the requirements of the contract to rebuild the reserve contemplated by the ultimate requirements for delivery of tungsten. (Findings 135, Tr. 141 Dec. 158 footnote 59.)

Admittedly, the contract on the part of the Government contemplated the acquisition of tungsten concentrates as well as the procurement of tungsten concentrates in specific and from the standpoint of the contract it was desirable to increase the productivity of its supplying companies and of any other small Portuguese producers (the pillagers). This is the thought and the only thought expressed in the preamble to the contract. But that thought cannot be tortured, as the Government contends, into transforming a contract for sale into a contract for production. Nor can the so-called anti-speculation clause contained in Article XX (d) be interpreted to restrict the tungsten supply available to Atlantica. See e.g. the elimination of such a suggestion in a preliminary draft, determinated Draft

X of the contract. Finding 95(c).) To interpret the anti speculation clause of Article XX(d) to impose such extensive restrictions has simply no justification. Neither the court below nor the Government cites any precedent or any administrative practice to support such a sweeping construction of a default provision admittedly a standard and even a "boiler-plate" item. (Finding 139(a)(c), 90(a)(b).) The *direct* purpose of this Article XX(d) is far narrower and wholly insufficient to bring this case outside of the rule established in *Burton Coal*, where sources of production were specifically designated, as distinguished from this case where limitation to sources of production was definitely eliminated. (Finding 95(c).)

To distinguish this case from *Burton Coal* is impossible. Denial of certiorari consequently means that implicitly this Court is overruling *Burton Coal*. Far better, if this be the Court's opinion, would be the grant of certiorari and the conclusion reached openly and after argument that *Burton Coal* is a mistaken application of the law of damages governing the breach of a contract.

(2) Reliance by Counsel for Atlantica on *Burton Coal*.

Counsel for Westbrook and Pulvermann have rarely in their experience seen two cases so closely on all-fours with each other as this case and *Burton Coal*. The differences that exist only strengthen the applicability of the rationale of *Burton Coal* to the instant case. No wonder that counsel for Atlantica presumed its applicability to this situation and handled his evidence on the assumption that the rule of *Burton Coal* would be the basis of the decision of the court below. (Finding 101, footnote 70.)

Counsel for the Government in their Brief in Opposition (p. 18) contend that the petitioner was specifically apprised of the fact that the Government held a contrary

position. To substantiate this point they refer to the testimony of a witness, Mooney, to be found in the Transcript, pp. 2210-2220. This reference, however, fairly read fails to prove the point. Admittedly, the witness offered in evidence a worksheet (Defendant's Ex. 60) that purported to deal with costs of production and containing no rationale upon which it was based. But, as the witness testified, the cost of operation of Atlantica, particularly of the acquisition of the tungsten ore by Atlantica, at a price of 60 escudos, upon which his calculations were based, was arbitrarily given to him by counsel for the Government. (Tr. 2276.) He had made no independent examination of these costs and consequently could not profitably be subjected to cross-examination on them, except with respect to his mathematical computations based on facts that he had been told to assume. The Government in its proposed findings makes only one short reference to these estimated costs. (Defendant's Proposed Finding No. 94.) Its chief effort in this connection was its contention that Atlantica did not have the ability to perform and that the rule of *Burton Ordnance* was not applicable.

Under these circumstances if the rule of damages to be applied is the difference between the contract price and the cost of production, petitioner's request for a remand should be granted to adduce adequate and reliable evidence as to such costs.

(3) The Erroneous Calculation of Damages

Assuming that damages are to be measured by the difference between contract price and the cost of production, the calculation of the court below of these damages is erroneous on two grounds: (a) its reliance upon a purely assumed state of facts which bears little relation to the reality of the situation; and (b) its neglect of certain elements of damage actually incurred by Atlantica.

(a) (i) Damages were calculated on the basis that the contract called for deliveries of 3,630 short tons (Findings 155(d), 156, 167(b)) whereas Atlantica was entitled to deliver a maximum of 4,290 short tons. The Government's own expert, Lynton, who had made a field survey of the situation, expressed himself as quoted in Finding 84 as follows:

> "The results of the survey indicate that Atlantica can possibly meet a production of 500 metric tons in the first year, 800 in the second year, and 1400 in the third. This is on the basis of the present contracts, signed and pending, but Atlantica points out that additional operators have expressed a desire for an Atlantica contract as soon as the EPS purchase contract is signed. Such additional contracts might increase the available tonnage or assure the fulfillment of the figures quoted."

It is submitted that the limiting figure of 3,630 short tons has no basis in the evidence and should not have been utilized.

(ii) Damages were calculated on the basis that the cost to the petitioner of acquiring tungsten would be 60 escudos per kilogram, even though the Court specifically found that substantial quantities could have been acquired below that price. (Finding 162(a).) The 60 escudo conclusion can only rest on the Mooney testimony, heretofore referred to, which was based on cost of acquisition he was arbitrarily told to assume by counsel for the Government. (R. 2276.) The 60 escudo price cannot rest on prices alleged to have been in the subcontracts made by Atlantica with the suppliers. In December, 1951, thirteen supply contracts had been submitted to the United States Embassy in Portugal and to the Government Procurement Agency for the purpose of satisfying the Government of Atlantica's

ability to perform. These contracts contained an initial price of 70 escudos per kilogram. At the time of their submittal to the Government, Westbrook and Pulvermann informed the Government that these contracts were being submitted solely for the purpose of showing Atlantica's ability to perform and would in all likelihood be substituted by others on more favorable terms by the time Atlantica's program was finalized. (Tr. 1095, 1304-5.)

On February 25, 1952, eleven of these contracts were revised to reduce the initial price from 70 to 60 escudos for the first three years and 50 escudos for the fourth and fifth years. (Plaintiff's Exhibit 27.) These revised contracts were not submitted to the Government. At the time the 60-50 escudos price was incorporated in these 5-year contracts it was contemplated by Atlantica that the Government would issue a divisible letter of credit so as to enable the supply companies to buy the new equipment for mechanization themselves. (Plaintiff's Ex. 24.) Three days after the signature of these revised contracts, the Government concluded that an indivisible letter of credit must be the basis for the prime contract and that the term should be reduced to three years. (Plaintiff's Ex. 173.) These and other changes required by the Government consequently required renegotiation of these contracts which no longer were applicable to the changed situation.

From that time on no further prices were negotiated between Atlantica and its supply companies. Nor were any final commitments made as to quantities. Indeed, as of the time of the finalization of the prime contract no supply contracts were in existence, Atlantica having given up trying to adjust prices and terms from the suppliers to the varying views of the Government. (Tr. 773-781, 801-803, 822-823, 847-848.) It contented itself with relying on the commitment of its suppliers to participate in the program. As

Lynton, the Government's expert reported in May of 1952 prices to be paid to the supply companies were not determined but would be "sufficiently less than that received from EPS so that Atlantica can make a fair profit on its handling of the tonnage, its resale and amortization of its equipment." (Finding 84.)

(iii) Damages as calculated included as a cost of production the Portuguese export tax of 40 escudos per kilogram. (Finding 104.) Alleviation of this tax to a certain degree had, however, been promised by the Portuguese Ministries of Finance and Economy. (Tr. 508-512, 751, 753, 872-874. See also Tr. Portuguese Hearings, 326.) Its full impact should not therefore have been considered a cost of production.

(iv) The damages as calculated included as an element of cost the fees payable to Westbrook and Pulvermann (Finding 105) for which Atlantica was legally committed upon the signing of the contract—a legal commitment that is not destroyed by the fact of nonperformance. *Restatement of the Law of Agency*, § 455, comment d; *Albright* v. *Kalbitzer*, 62 F. Supp. 815. This neglects the fact that the fees due Westbrook and Pulvermann are not elements of cost but represent their share as co-venturers of the potential profits under the contract. If regarded as an element of cost, since Atlantica was legally committed to pay them, the award of damages should have been such as to compensate Atlantica for the liability it assumed.

(v) (a) Secondly, the damages as calculated fail to take into account basic costs that would have been incurred by the petitioner which could reduce the "anticipated profit" as determined by the lower court to a figure that would make absurd any such calculation of $508,200.00 as Atlantica's estimated profit. No figure for rents, communication, or

overhead other than salaries, is included. (Finding 166.) Nor is there any figure in the calculation representing large investments of about $1,700,000 in machinery and equipment (Finding 160(a)) which Atlantica, because of the indivisible letter of credit, would be bound to make, and which would necessarily call for amortization and interest payments in part or in whole over the life of the contract.

(iii) The breach of the contract by the Government, particularly because of the manner of that breach whereby Westbrook and Pulverbaum, were charged by the Chief Executive of the Government with being "five-percenters," and thus reflecting upon the integrity of the entire Portuguese enterprise, destroyed Atlantica as a potentially operating entity. Its revival appears impossible. Some element of damage beyond those normally recoverable appears justifiable under the familiar rule that the person guilty of a breach of contract should be liable for consequences clearly foreseeable at the time of the breach.

In short, on the assumption that the rule of *Hurley Coal* is not applicable, this record, for the reasons above advanced, provides insufficient evidence to enable any adequate determination of the "profit" derivable from the prime contract in the period of performance, 1953-1955 or of the total damages incurred by Atlantica. Indeed the court below recognizes this fact. The correction of the admitted inadequacies in this case can only be achieved by an appropriate remand to the court below.

The Government's Cross-Petition

The Government's cross-petition for certiorari [illegible] to raise the issue of a violation of Article XVII of the contract, which embodies the basic provisions of Section 304 of the Federal Property and Administrative Services Act of 1949, 41 USC A § 254(a).

Westbrook and Pulvermann, whose reputation for integrity was put in issue to their own great detriment by the manner in which the Government chose to commit a breach of this contract, are not averse to this Court again reviewing this issue. To have the exoneration given them by the findings of the lower court underwritten by this Court would help to erase to some degree the stigma that in 1952 the Government sought to attach to their activities and their reputations.

Westbrook and Pulvermann feel confident that this Court will not disturb the findings of the lower court. This issue, as distinguished from the issue of damages, was fully and thoroughly explored during the lengthy hearings. Both Westbrook and Pulvermann voluntarily testified and withheld nothing in the way of testimony or documents from the Commissioner. They wanted to and did vindicate themselves.

The findings of the court below on this issue are comprehensive. (Findings 6, 7, 10, 135-137.) Westbrook and Pulvermann's contract with Atlantica was from the start made available and filed with the contracting agency of the Government. The extraordinary efforts put in by Westbrook and Pulvermann in the progress of negotiating the contract, their peculiar talents to handle the various phases of this endeavor, their continuing responsibility for overseeing the performance of this contract in close cooperation with Atlantica, their contemplated use to bring other business to Atlantica from other nations in other products, all these are fully spelled out both on the record and in the findings. Because of the high stakes involved in this case the Government expended every effort in its attempt to impute motives to these men that would enable the Government to avoid [illegible] of the provisions of Article XVII. In this the Government [illegible]

the lower court. It is not necessary in our judgment for this issue to be reviewed, but Westbrook and Pulvermann have no fear of such a review.

Conclusion

Wherefore, Westbrook and Pulvermann pray that a writ of certiorari be directed by this Court to review the judgment in this case by the Court of Claims; such writ to have such a scope of review as to this Court, in the light of the petition and cross-petition, may seem just and wise.

Respectfully submitted,

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September 29, 1960